Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-941

EDWARD CASTELLANO, KENNETH PARDELL, FRANK MUSIAL, FRANK MAHER, JAMES SESSO and DONALD MELCHIORI,

Petitioners,

vs.

WILLIE SPEARS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM R. QUINLAN,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Attorney for Petitioners.

ROBERT R. RETKE,
EDMUND HATFIELD,
Assistant Corporation Counsel,
Of Counsel.

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Edward Castellano, Kenneth Pardell, Frank Musial, Frank Maher, James Sesso and Donald Melchiori respectfully pray that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Seventh Circuit in this cause.

OPINIONS BELOW

The judgment order of the Court of Appeals was filed on May 29, 1979. The order includes a brief opinion. It was accompanied by a direction of that court that, pursuant to its Circuit Rule 35, the order is to be unpublished and is not to be cited. The order of the Court of Appeals is reproduced in Appendix A.

The memorandum opinion of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on November 3, 1977, *sub nomine Spears* v. *Conlisk et al.*, No. 73 C 277. It is reported at 440 F.Supp. 490 (1977) and is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1979.

The jurisdiction of this Court rests on 28 U.S. Code § 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial judge deprived petitioner Castellano of due process of law in relying on the reported statement of another judge in another case, with a different standard of proof, commenting unfavorably on the veracity of petitioner Castellano—a statement not subject to cross-examination in the instant case.

2. Whether the Court of Appeals erred in holding that the case was reducible to a question of the credibility of the witnesses where the testimony of respondent Spears himself demonstrated that the shooting of him by petitioner Castellano, who was admittedly acting reasonably in the circumstances, was accidental.

3. Whether the district court's entry of judgment for the plaintiff in the amount of $200,000 is grossly excessive and made without adequate proof of damages.

STATEMENT OF THE CASE

This lawsuit under the Civil Rights Act and the Fourteenth Amendment was originally filed against nine Chicago police officers—Castellano, Benigno, Granias, Pardell, Jensen, Musial, Maher, Sesso and Melchiori—against the then Superintendent of the Chicago Police Department, James Conlisk, and against the City of Chicago.

The complaint alleged that on January 31, 1972, at approximately 12:45 a.m., while the plaintiff Willie Spears was lawfully in an apartment building at 333 North Central Avenue in Chicago, Officer Castellano "did maliciously, wrongfully, illegally and knowingly, without warrant, cause or permission of plaintiff," stop plaintiff in the hallway, place him against the wall, place a revolver at the rear of plaintiff's neck and "did wrongfully, illegally, maliciously and knowingly cause said revolver to discharge into the left rear of plaintiff's neck."

Continuing, the complaint averred that Castellano immediately thereafter formed a conspiracy with Officer Benigno to file a false report of the incident to the effect that Castellano's gun had discharged while they were face-to-face and as a result of plaintiff's grabbing Castellano's arm, thereby causing discharge of the weapon.

It was further stated that Castellano filed false criminal charges against plaintiff resulting in plaintiff's being charged with felony and held in jail from January 31, 1972, to August 25, 1972, and subjected to a criminal trial in which he was acquitted.

The City of Chicago was dismissed under the rule of *Monroe* v. *Pape,* 365 U.S. 167 (1961). Superintendent Conlisk was also dismissed.

A bench trial was held on April 29 and 30 and May 3, 1977. At the conclusion of plaintiff's case in chief, the court dismissed defendant Officers Benigno, Granias and Jensen. These various dismissals were not cross-appealed.

Exactly 18 months later, on November 3, 1977, District Judge Prentice H. Marshall entered judgment for the plaintiff. The court awarded Spears $100,000 in damages against Officer Castellano, plus another $100,000 in damages against Officers Pardell, Musial, Maher, Sesso and Melchiori, jointly and severally. The memorandum decision of the district court, accompanying the judgment, is published at 440 F. Supp. 490 and is reproduced as Appendix B of this petition.

The memorandum opinion of the district court found that plaintiff "had stopped in the building to visit a friend." It further found that Officer Castellano was in the building in response to a burglary in progress call, that he was in uniform and that "in all the circumstances, he understandably had his gun in his hand." The court found that Spears did not heed Castellano's command to halt, but continued walking towards Castellano with his hands in the pockets of his overcoat until he was within three or four feet of Castellano, even though Castellano admittedly told him a second time to stop.

As for the shooting, the district court credited its own summation of Spears' testimony as against its summation of Castellano's testimony. The court found (440 F.Supp. at 497; App. B, pp. 18a, 19a):

> "In the circumstances which confronted Castellano that night, he was justified in having his weapon ready

for use. His command to plaintiff to halt and get up against the wall so he could pat plaintiff down was reasonable. *Terry* v. *Ohio,* 392 U.S. 1 (1968). But there was no occasion for him to discharge his weapon. And under no circumstances was he justified in falsely accusing plaintiff of resisting arrest and battery and of testifying falsely at the preliminary hearing, grand jury, two criminal trials and the trial here that he had shot plaintiff from the front when plaintiff grabbed for his gun."

The district court reached this conclusion on the basis of medical testimony as to the significance of the entrance and exit scars on Spears' neck. But it also attached obvious weight to a remark of the trial judge in Spears' criminal trial, to which Judge Marshall expressly referred in the following footnote to his memorandum decision (440 F.Supp. at 495, 496; App. B, p. 15a):

"Although the unlawful use of weapon charge did not directly involve the plaintiff's encounter with Castellano, Judge Downing heard testimony concerning it. At the conclusion of the trial in rendering an oral opinion in which he found plaintiff not guilty Judge Downing said 'The court finds it very difficult [in light of all the evidence] to attach much credibility to the testimony of Officer Castellano'."

As for the issue of whether the gun alleged to have been found in the squadrol was admitted by Spears to be his, the district court accepted Spears' testimony that he was searched by the police before he was placed in the squadrol and that he did not admit to the officers that the gun found in the squadrol was his as against the testimony of five police officers, two of whom stated they were unable to search Spears because he slumped to the ground whenever they attempted to do so, and four of whom stated that Spears admitted to them that the gun was his.

As for damages, the district court found that, as a consequence of Castellano's use of excessive force, Spears had suffered a grievous wound and undergone attendant pain and suffering which persisted for almost a year. But the court noted there were no permanent injuries except two scars on Spears' neck. And as a consequence of the charges made against Spears by the other defendants, he had been incarcerated for more than eight months awaiting trial, had lost his part time job as a checker at Sears, and had incurred attorney's fees.

Defendants' motion for a new trial was denied on January 4, 1978. Notice of appeal was filed by them on February 3, 1978.

On February 27, 1978, the district court entered judgment awarding plaintiff attorney's fees in the amount of $10,500.00. Defendants filed notice of appeal from that award on March 2, 1978.

The two appeals were consolidated in the Court of Appeals for the Seventh Circuit.

On May 29, 1979, the court of appeals affirmed. Its judgment order (App. A, p. 3a) stated:

"We are not persuaded that the district court's findings are clearly erroneous as a matter of law. Nor can we say that the amount of damages was excessive in view of the injuries that resulted from the shooting and the eight months of incarceration, both of which were willful violations of the appellee's civil rights."

On June 21, 1979, the court of appeals entered an order staying its mandate until July 20, 1979, in accordance with the provisions of Rule 41 (b) of the Federal Rules of Appellate Procedure.

REASONS FOR GRANTING THE WRIT

I.

SPEARS' OWN TESTIMONY DEMONSTRATES THAT THE SHOOTING OF HIM BY OFFICER CASTELLANO WAS ACCIDENTAL.

THE FINDING OF THE DISTRICT COURT WAS CLEARLY ERRONEOUS AS A MATTER OF LAW. THE COURT OF APPEALS ERRED IN NOT REVERSING THAT FINDING.

The district court found (440 F.Supp. at 498, App. B, p. 20a):

> "Castellano violated plaintiff's Fourth, Eighth and Fourteenth Amendment rights when he *intentionally or recklessly* shot plaintiff." (Emphasis supplied.)

There is absolutely no evidence in the record in support of that finding. The testimony of the plaintiff himself clearly demonstrates that the shooting of Spears was accidental.

There were only two occurrence witnesses to the shooting—plaintiff Spears and defendant Castellano. The plaintiff, of course, had the burden of proving his charge that he had been shot by Castellano "wrongfully, illegally, maliciously and knowingly." But the plaintiff's own testimony, taken at face value and viewed in the most favorable light, contradicts this. And the testimony of the only other occurrence witness, Castellano himself, although differing in details from that of Spears, in no way indicates that the shooting was intentional or reckless.

It is undisputed that Officer Castellano was in the apartment building at 333 North Central Avenue in Chicago

shortly after midnight in response to a burglary in progress alarm. It is undisputed that at the time Castellano was garbed in the conspicuous and locally well known uniform of a Chicago police officer. It is undisputed that Spears, upon encountering Castellano in the second floor hallway, immediately recognized that Castellano was a police officer.

The opinion of the district court (440 F.Supp. at 497; App. B) expressly found:

> "In the circumstances that confronted Castellano that night, *he was justified in having his weapon ready for use.* His command to plaintiff to halt and get up against the wall so that he could pat plaintiff down was *reasonable. Terry* v. *Ohio,* 392 U.S. 1 (1968)." (Emphasis added.)

Plaintiff's counsel conceded in his closing argument (T. 374) that Officer Castellano "was justified under the Fourth Amendment in ordering Mr. Spears to stop in the circumstances in which Castellano found him." Plaintiff's counsel also conceded that Castellano was justified in drawing his weapon (T. 374).

Spears said he asked Castellano why he was stopping him, adding, "I am no burglar" (T. 62).

In any event, Spears did not obey Castellano's order to halt, but continued walking toward Castellano with his hands in his pockets. In the exercise of elementary common sense, Spears should have known that this made him highly suspicious.

Disobeying Castellano's second order to halt and to take his hands out of his pockets, Spears continued walking directly towards Castellano until he was within three or

four feet of him, according to Spears' own account (T. 63). Spears still had his hands in his pockets (T. 63).

Spears' explanation was that he kept walking because "I didn't have no reason to halt because I didn't did anything" (T. 64). He said he did not know Castellano was talking to him, although there was no one else in the hallway (T. 66).

At this point, according to Spears, Castellano told Spears to get up on the wall. Under the leading case of *Terry* v. *Ohio,* 392 U.S. 1 (1968), which held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the original stages of the encounter serves to dispel his reasonable fear for his own or others' safety," in these limited circumstances the police officer is entitled to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons that might be used to assault him.

Castellano did just that, according to Spears (T. 25, 26) and the district court held that Castellano was justified in so doing. But, as Castellano, with his left hand, was patting Spears' body from the neck on down, then, according to Spears' testimony (T. 26):

> ". . . He went into my left pocket with his left hand. That's when *I turned around. I turned around and grabbed his hand,* say [sic] 'you're trying to take my wallet.' " (Emphasis added).

Spears testified, "he put the gun behind my neck and told me to get back against the wall" (T. 27). Castellano was justified in so doing. An officer may use reasonable minimal force in executing a "stop and frisk." Although he may not use force that is likely to cause death or grave bodily harm, here the suspect had committed the reckless and threatening act of grabbing the officer's hand. The district court properly ruled that the officer was justified in the circumstances in openly carrying his firearm in his hand, ready for use. When Spears admittedly turned his head around, and grabbed Castellano's left hand, the officer was not required to wait until Spears grabbed his other hand and attempted to wrest his gun from him. Instead, Castellano was justified in putting the gun where he could use it to effect if Spears attempted to take it away from him.

Then, in Spears' own words, he "tried to shift the weight to the left side from the pressure. And that's when he shot me . . . Yeah, the gun went off."

The district court relied heavily on the testimony of Dr. Levine, who appeared as an expert in forensic pathology. Dr. Levine had first examined the scars on Spears' neck in June, 1972, about five months after the shooting, in preparation for the felony trial, at which the doctor had testified on behalf of Spears. He examined them again in open court in the trial of the instant case. Dr. Levine stated that the round, indented scar on the back of Spears' neck was a typical entrance wound and the irregular scar on the front of his neck was a typical exit wound. From this the district court concluded that Castellano, who testified that he and Spears were face to face when the shooting occurred, was lying.

The district court overlooked the fact that Spears had testified (T. 26) that, as Castellano went into his pocket with his left hand, "That's when I turned around. I turned around and grabbed his hand." Thus, according to Spears, he and Castellano were face to face when the gun went off, although Spears still had his back turned to Castellano. With Spears' body in that position, the bullet would have entered the back of Spears' neck, although he and Castellano were face to face, as Castellano testified.

The opinion of the district court (R. 48, p. 15) states: "[W]e are persuaded that the shooting incident occurred as plaintiff has testified." If the district court had adhered to that persuasion, it would have entered judgment for defendant Castellano.

With respect to the shooting incident involving Officer Castellano, the trial court's interpretation of the evidence was clearly erroneous.

Such erroneous interpretation of the evidence is reviewable and reversible on appeal. The unpublished, non-citable opinion of the Seventh Circuit, reducing this case to no more than a determination of the credibility of the witnesses, is also erroneous, reviewable and reversible.

II.

THE TRIAL JUDGE DEPRIVED PETITIONER CASTELLANO OF DUE PROCESS OF LAW IN RELYING ON THE OPINION OF ANOTHER JUDGE IN ANOTHER CASE AS TO THE VERACITY OF SAID PETITIONER—A STATEMENT NOT SUBJECT TO CROSS-EXAMINATION.

The bench trial of this case in the district court was concluded on May 3, 1976 (R. 47). The opinion of the district court was filed on November 3, 1977 (R. 48). The district judge took exactly 18 months to reach his decision.

By that time the judge's first-hand impressions of the witnesses and their testimony were no doubt considerably dimmed by the inordinate passage of time. It was in these circumstances that the district judge expressly cited the finding of a state court judge in the trial of criminal charges brought against Spears as a result of the incident. The court stated (440 F.Supp. at 495, 496):

> "These same issues were presented to two state court judges in the criminal charges brought against plaintiff.[3]

"[3] . . . At the conclusion of the trial in rendering an oral opinion in which he found plaintiff not guilty Judge Downing said 'The Court finds it very difficult (in light of all the evidence) to attach much credibility to the testimony of Officer Castellano.' "

Rule 608 (a) of the Federal Rules of Evidence does permit the credibility of a witness to be attacked or supported "by evidence in the form of opinion or reputation." But Rule 608 (b) provides that "specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence."

Although, under Rule 803 (21), the "reputation of a person's character among his associates or in the community" may not be excluded under the hearsay rule, the district court, in determining Castellano's credibility, did not consider Castellano's reputation for veracity among Castellano's associates or in the community, but relied on the hearsay opinion of a person not present at the trial of this case, an opinion based on one specific instance.

If Judge Downing's views as to the credibility of Castellano in a criminal case with a different burden of proof, in which Castellano was not a party, but a witness for the prosecution, were significant in a civil case in which Castellano is a defendant, then the defense in the instant case should have had an opportunity to cross-examine and possibly impeach Judge Downing as a character witness.

"For two centuries, common law judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that the opportunity is a right and not a mere privilege. *Alford* v. *United States*, 282 U.S. 681, at 691 (1931); *Smith* v. *State of Illinois*, 390 U.S. 129 (1968); *Douglas* v. *Alabama*, 380 U.S. 415 (1967); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Barber* v. *Page*, 390 U.S. 719 (1968); *California* v. *Green*, 399 U.S. 149 (1970)." *McCormick on Evidence* (1972 ed.), pp. 43, 44. See also 5 *Wigmore on Evidence*, § 1367.

To deprive a defendant of such a right is to deprive him of a fair hearing and of procedural due process.

III.

THE ERRONEOUS RELIANCE ON THE HEARSAY OPINION OF ANOTHER JUDGE IN ANOTHER PROCEEDING ALSO DETERMINED THE AWARD OF THE $100,000 JUDGMENT AGAINST THE OTHER FIVE PETITIONERS.

The same error of reliance on the hearsay opinion of another judge in another trial of another case palpably determined the other judgment for $100,000 which the district court awarded Spears against the five other petitioners—police officers Pardell, Maher, Musial, Sesso and Melchiori.

The district court found (440 F.Supp. at 498; App. B, p. 20a):

> "The credible testimony and circumstances leave us with an abiding conviction that the gun was not found in the squadrol and Pardell's testimony that it was is false. Plaintiff did not admit ownership of the gun and the testimony of Maher, Musial, Sesso and Melchiori that he did is false. In short, Pardell, Maher, Musial, Sesso and Melchiori falsely accused plaintiff of possession of a concealed gun."

To reach that conclusion the district court had to credit the uncorroborated testimony of a person the opinion of the district court (440 F.Supp. at 491; App. B, p. 4a) describes as "a four-time convicted felon" against the testimony of five police officers. The record is devoid of evidence of any blemish on the record of any of these five officers. There is nothing in the record that indicates that any of these officers perjured himself. If the demeanor of any of those witnesses against Spears did not inspire the district court with confidence, the court has failed to note that.

But, as the district court itself plainly stated, since "[p]laintiff, who we have found credible with respect to the shooting incident" (440 F.Supp. at 497; App. B, p. 19a), testified to the contrary, the district court disbelieved the police officers. Thus, the error of reliance on the hearsay opinion of Judge Downing carried over into the decision to enter another $100,000 judgment against the five other petitioners.

IV.

THE TWO JUDGMENTS FOR $100,000 EACH ARE EGREGIOUSLY EXCESSIVE IN AMOUNT AND SHOULD BE SET ASIDE.

The two judgments for $100,000 each entered by the district court were stated by that court to be "separate and distinct" from each other, because Castellano's conduct was separate and distinct from that of the other defendants, who were found to have acted jointly (440 F.Supp. at 498; App. B). Therefore, it is appropriate to consider the two judgments separately.

As a result of the shooting, Spears suffered a bullet wound in his neck and attendant pain and suffering, which he testified persisted for about a year. Spears suffered no permanent injuries other than the entry and exit scars. His hospitalization in the infirmary of the Cook County Jail was at the expense of the county.

As a result of the gun charges, Spears was confined in the county jail for eight months awaiting trial because he was unable to post bond. Spears testified that as a result of his incarceration he lost a part time job as a checker at a Sears store employed at a rate of $3.25 an hour. He also was found to have incurred attorney's fees in defending himself against the criminal charges, but the amount of the fees was not alleged or proven.

The $200,000 total of judgments in this case departs egregiously from approved practice and was an abuse of judicial discretion. *Aldridge* v. *Mullins,* 474 F.2d 1189 (6 Cir. 1973), affirming 377 F.Supp. 850 (D.C., Tenn., 1972) ($13,000); *Scott* v. *Vandover,* 476 F.2d 238 (4 Cir., 1973) ($22,933); *Collum* v. *Butler,* 421 F.2d 1257 (7 Cir.

1970), affirming 288 F.Supp. 918 (D.C., N.D., Ill., 1968) ($6000).

In *Roberts* v. *Williams,* 456 F.2d 819 (5 Cir. 1972), cert. denied, 92 S.Ct. 83, $85,000 was awarded an inmate of a state convict farm who had been blinded and otherwise severely injured by a gunshot fired by a guard, with the result that the plaintiff would be totally disabled during a life expectancy of 49 years.

And in *Jackson* v. *Duke,* 259 F.2d 3 (5 Cir. 1958), the opinion, written by Judge Wisdom, held a judgment for $5000 "a reasonable finding" (at 7), where the plaintiff, while drinking a coca cola, had been pistol whipped by the defendant police officers, knocked down, stomped, kicked in the face, throat and stomach, falsely arrested, falsely accused of drunkenness and unlawfully jailed. Even inflation would not raise that $5000 to anything approaching $200,000.

CONCLUSION

For the foregoing reasons, it is requested that a writ of certiorari issue and that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

WILLIAM R. QUINLAN,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Attorney for Petitioners.

ROBERT R. RETKE,
EDMUND HATFIELD,
Assistant Corporation Counsel,
Of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

ARGUED DECEMBER 5, 1978
May 29, 1979.

Before
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. DONALD P. LAY, *Circuit Judge**
Hon. WILLIAM J. BAUER, *Circuit Judge*

WILLIE SPEARS,

Plaintiff-Appellee,

Nos. 78-1220 and 78-1839

vs.

EDWARD CASTELLANO, KENNETH PARDELL, FRANK MUSIAL, FRANK MAHER, JAMES SESSO and DONALD MELCHIORI, et al.,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 277 — Prentice H. Marshall, Judge.

ORDER

(Unpublished Order Not To Be Cited Per Circuit Rule 35)

This appeal arises from an action brought by the appellee Willie Spears under 28 U.S.C. §§ 1331 and 1343(3),

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* The Hon. Donald P. Lay, Judge of the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

and 42 U.S.C. §§ 1983 and 1988. The complaint alleged that on January 31, 1972, Officer Edward Castellano "did maliciously, wrongfully, illegally and knowingly, without warrant [or] cause" stop Spears in the hallway of a building, place him against the wall, put a revolver at the back of his neck, and "did wrongfully, illegally, maliciously and knowingly cause said revolver to discharge into the left rear of plaintiff's neck." The complaint also alleged that Castellano entered into a conspiracy with Officers Pardell, Musial, Maher, Sesso and Melchiori to file false criminal charges against Spears. More specifically, according to the complaint, the officers "planted" a .22 caliber revolver and falsely testified that Spears admitted the gun was his.

Following a bench trial, the district court awarded Spears $100,000 in damages against Castellano and $100,000 in damages against Pardell, Musial, Maher, Sesso and Melchiori. The defendants now appeal, arguing that the district court erred in its interpretation of the evidence, and that both the judgment and the award of attorney fees are excessive.

In their major argument on appeal, the police officers claim that the district court made several errors in its interpretation of the evidence. In particular, the appellants claim that the court erroneously credited the testimony of Spears—a four time convicted felon—as against that of five police officers, and that it ignored portions of Spears' testimony that allegedly weakened his case. This Court has repeatedly held, however, that "it is for the district court to determine the credibility of the witnesses, to weigh the evidence and resolve any conflicts therein." *Howard Industries, Inc.* v. *Rae Motor Corporation,* 267 F. 2d 430, 433 (7th Cir. 1959). Accordingly, "we are not at

liberty to disturb the findings of fact unless we can say as a matter of law that the court's interpretation of the evidence is clearly erroneous." *Philco Corporation* v. *F. & B. Manufacturing Co.,* 170 F.2d 958, 960 (7th Cir. 1948).

After reviewing the record in this case, we are not persuaded that the district court's conclusions are clearly erroneous as a matter of law. Nor can we say that the award of damages was excessive in view of the injuries that resulted from the shooting and the eight months of incarceration—both of which were willful violations of the appellee's civil rights. Finally, we find no basis for holding that the lower court abused its discretion in the award of attorney's fees. The judgment of the district court is therefore

AFFIRMED.

APPENDIX B

In The
UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

WILLIE SPEARS,
Plaintiff,
v.
JAMES CONLISK, Superintendent of Chicago Police Department, CITY OF CHICAGO, a Municipal Corporation, EDWARD CASTELLANO, JOSEPH C. BENIGNO, THOMAS GRANIAS, KENNETH PARDELL, THEODORE JENSEN, FRANK MUSIAL, FRANK MAHER, JAMES SESSO and DONALD MELCHIORI,
Defendants.

No. 73 C 277

MEMORANDUM DECISION

This is an action by plaintiff Willie Spears, a four-time convicted felon, against James Conlisk, the former Superintendent of the Chicago Police Department, the City of Chicago, a municipal corporation, and nine Chicago Police Officers, Edward Castellano, Joseph C. Benigno, Thomas Granias, Kenneth Pardell, Theodore Jensen, Frank Musial, Frank Maher, James Sesso and Donald Melchiori, brought under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and §§ 1983 and 1988 of Title 42 United States Code, with jurisdiction under §§ 1331 and 1343(3) of Title 28 of the United States Code, alleging that defendants individually and collectively deprived plaintiff of rights guaranteed him by the Four-

teenth Amendment. The case was tried to the court without a jury. Prior to trial, defendants Conlisk and the City of Chicago were dismissed by Judge Parsons of this court upon the ground that they were not amenable to suit under Section 1983. *Rizzo* v. *Goode*, 96 S.Ct. 598, ... U.S. ..... (1976); *Monroe* v. *Pape*, 365 U.S. 167 (1961). Since that dismissal, the Court of Appeals for this circuit has also held that the City in the circumstances of this case is not amenable to suit directly under the Fourteenth Amendment. *McDonald* v. *State of Illinois*, 557 F.2d 596 (7th Cir. 1977). At the close of plaintiff's case, plaintiff conceded that no evidence had been adduced implicating defendants Granias, Benigno and Jensen in the alleged wrongs of which plaintiff complains. Accordingly, they were dismissed as defendants at that time. Thus, what remains is plaintiff's complaint against Castellano, Pardell, Musial, Maher, Sesso and Melchiori. This memorandum will stand as our findings of fact and conclusions of law under Rule 52(a), *Fed. R. Civ. P.*

The complaint is in one count. It alleges that on January 31, 1972, Castellano unlawfully arrested and shot plaintiff and thereafter falsely accused plaintiff of battery of a police officer and resisting arrest. The complaint proceeds to allege that following the incident between Castellano and plaintiff, Castellano, Pardell, Musial, Maher, Sesso and Melchiori, acting in concert, falsely stated that they had found a gun in a squadrol in which plaintiff was transported, and falsely stated that plaintiff admitted the gun was his when confronted with it. Plaintiff claims that as a consequence of defendants' individual and collective misconduct, he was falsely charged in the Illinois State courts with unlawful use of a weapon (knowingly carrying a concealed weapon), battery and resisting arrest, and

that each of the defendants testified falsely against plaintiff as to those charges at a preliminary hearing, before the Illinois Grand Jury, and at his separate trials on the unlawful use of weapon, battery and resisting arrest charges. It is undisputed that plaintiff was charged as he alleges, was twice tried in bench trials in the Illinois State courts (once on the charge of unlawful use of weapon, and later on the charges of battery and resisting arrest), and was acquitted in those bench trials of all of the charges. This action followed.

At about midnight of January 30-31, 1972, Officers Castellano and Benigno were on patrol duty in their squad car on the far west side of the city. Shortly after midnight they received a radio assignment of a burglary in progress at 333 North Central Avenue. They proceeded to that location and entered a four-story double-winged multi-apartment building. There were two staircases. Castellano went up the staircase serving the north wing; Benigno took the south wing.

Castellano went up to the first floor, checked the long corridor which runs east and west, saw no evidence of burglary or forced entry, returned to the stairwell and proceeded to the second floor. Here he encountered plaintiff who had stopped in the building to visit a friend.

As Castellano stepped out of the stairwell into the east-west corridor, he saw plaintiff about 20 feet down the corridor to the west walking in an easterly direction toward Castellano. Castellano was in uniform and in all of the circumstances, he understandably had his gun in his hand. He told plaintiff to halt. Plaintiff did not heed the command. Instead, he continued toward Castellano with his hands in the side pockets of a pea coat he was wearing.

According to plaintiff, Castellano asked what plaintiff was doing in the building. According to Castellano, plaintiff responded "I'm no burglar." Both agree that plaintiff kept walking toward Castellano and that Castellano ordered him to halt and take his hands out of his pockets. Plaintiff kept walking. Castellano repeated the command, but plaintiff continued his approach to within three or four feet of Castellano. At this point, there is an irreconcilable conflict in the testimony.

Castellano testified that plaintiff stopped and took his left hand out of the pea coat, but not his right. Castellano reached forward to pat down plaintiff's right outer garment. His gun was belt high, pointing at plaintiff's stomach and was not cocked. As Castellano reached forward with his left hand to pat plaintiff, plaintiff grabbed Castellano's right wrist and pulled Castellano forward. Castellano's gun discharged and plaintiff was shot in the left side of the neck, the bullet entering the front (anterior) of the neck and exiting the rear (posterior).

Plaintiff's version was markedly different. He testified that when he got within four feet of Castellano, he was ordered to take his hands out of his pockets and get up against the wall. Castellano had a gun in his right hand pointed at plaintiff's midsection. Plaintiff turned and faced the wall and placed his hands on the wall over his head. Castellano was behind him. Castellano started to pat plaintiff down using his left hand. He went into plaintiff's left hip pocket and plaintiff turned to him and said that he was trying to take plaintiff's wallet. Plaintiff grabbed Castellano's left hand. Castellano then put his gun on the back (posterior) of the left side of plaintiff's neck and told him to get back up against the wall. Plaintiff tried to shift from under the pressure of the

gun muzzle. The gun discharged and plaintiff was shot through the left side of the neck with the bullet entering the rear (posterior) and exiting the front (anterior).

According to Castellano, after the shot was filed, both he and plaintiff froze for a second or two. Castellano saw a red circle on the left side of plaintiff's neck. Plaintiff then slumped toward the wall. Castellano holstered his gun and grabbed plaintiff by the arms. At that point he was joined by Officer Granias who took plaintiff downstairs to a squadrol. The next time Castellano saw plaintiff was at the 15th District police station which, as we shall see, was after plaintiff had been taken to a hospital.

Plaintiff's version of the immediate post-shooting activity is different. He testified that after he was shot he fell. That Castellano then went through his pockets. Then Castellano called on his hand radio for a wagon. Two more uniformed police came to the second floor corridor. They took him downstairs and put him in a squadrol. They searched him on the way.

Plaintiff's account is corroborated by the testimony of Officers Granias and Benigno that they went to the second floor and took plaintiff downstairs. Granias testified, however, that as he tried to search plaintiff on the way down, plaintiff fell into Granias' arms and Granias was not able to pat down plaintiff's pockets.

Officer Pardell was a squadrol operator on duty with his partner Officer Jensen in the same west side area. About midnight they received a radio call for a burglary in progress at 333 North Central Avenue. According to Pardell, when they arrived they observed a squad car on the west side of Central Avenue and some officers interviewing

some youths in an alley. On the east side of Central Avenue, there were two squad cars but they observed no officers.

Shortly after their arrival, Pardell observed Officer Granias with plaintiff in his custody. Pardell asked Granias what the situation was and Granias replied that Castellano had shot plaintiff. Pardell began to search plaintiff. He ran his hands down from under plaintiff's arms to his ankles. Plaintiff had his left hand to his neck. Pardell saw blood. Plaintiff said, "It hurts, man, it hurts." Pardell said, "Let's get him to the hospital." Plaintiff was put in the prisoner's section of the squadrol on a stretcher and taken to Loretto Hospital.

When they arrived, Pardell walked plaintiff into the hospital and delivered him to a nurse. He kept plaintiff under constant observation until other officers arrived and relieved him.

Pardell testified that he immediately returned to his squadrol and searched the prisoner's compartment. Under the stretcher he found a .22 caliber Rohn revolver. Plaintiff had been the first prisoner in the squadrol during Pardell's shift and prior to checking out the squadrol that night, Pardell had searched the compartment and found nothing. He picked up the gun by the checkered grip and took it inside where he saw Officer Maher. He motioned to Maher and gave him the gun.

Officer Maher testified that he was on duty the night in question in the same west side area. He was called to 333 North Central Avenue and then to the emergency room at Loretto Hospital. When he arrived at the hospital he saw plaintiff seated in the emergency room with a gauze bandage around his neck. Officers Sesso, Melchiori

and Musial were also there and Sesso was questioning plaintiff.

Maher testified that Pardell came to the emergency room and motioned for Maher to step outside. When he did so, Pardell handed him a .22 caliber Rohn revolver and told Maher that he had found it in the wagon. Maher took the gun from Pardell and went back to the emergency room holding the gun by the grip to preserve fingerprints. As Maher held the gun by the grip, Sesso asked plaintiff if the gun was his. Plaintiff reached out, nodded affirmatively and said "Yes." At that time, Maher, Sesso, Melchiori and Musial were present.

Plaintiff denied that he had admitted that the gun was his.

Maher testified that he took the gun to the 15th District police station. On his way he asked by radio for a crime lab person to meet him there. Upon arrival, he turned the gun over to the crime lab person to check for fingerprints. The crime lab person was dusting the gun when Maher heard something fall to the floor. He turned and the technician was picking up the bullets off the floor without taking any precautionary measures to preserve the integrity of any fingerprints.

Officers Musial, Sesso and Melchiori all testified that they arrived at the emergency room at Loretto Hospital while plaintiff was there. Each testified that when Maher came in with the gun, Sesso, who was questioning plaintiff, asked plaintiff if the gun was his and that plaintiff nodded and said "Yes." Musial also testified that when he first arrived at Loretto, plaintiff was seated on the table yelling, "If I had my piece, things would be different."

While he was at Loretto Hospital, plaintiff was taken to the x-ray department by Officer Benigno. On the way plaintiff asked Benigno if the bullet had come out, exposing the rear of his neck. On the elevator, according to Benigno, plaintiff's bandage fell off and Benigno saw what he identified as powder burns around the wound in the front.

Plaintiff was treated at Loretto by Dr. Edward Smith, Smith first recorded on the emergency room record that plaintiff had suffered a gun shot wound at the left side of the neck with entry at the left posterior (back) and exit at the left anterior (front) below the angle of the jaw.[1] Smith then changed the entry to read that the exit was in the left posterior and the entry in the left anterior. Under physical findings he noted a painful neck with spasms and good carotid pulses. The throat was OK, the ears were OK and the neck showed powder (?) burns at the anterior (front) triangle of the neck.[2] When asked to explain his change between exit and entry, Smith responded by a letter to plaintiff's counsel in April, 1972 which was received in evidence without objection:

> "I think I remember changing the words 'exit' and 'entry' because of what I noted in 'physical findings' i.e., where it says: 'neck powder (?) burns antr △ (anterior triangle) L neck.' There were punctate discolorations at that area which neither looked like typical burns *nor* like a bruise that one sees at exit wounds sometimes. I gather that the emergency room at Cermak Hospital detected changes in his condition re-

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1 The actual entry reads, "GSW (L) SIDE OF NECK Entry L Postr neck. Exit L antr neck below angle of jaw."

2 The actual entry reads, "Painful neck ⇧ spasms good carotid pulses. Throat OK Ears OK Neck ⇧ powder (?) burns antr △ L neck."

garding the skin wounds which may have caused them to regard the situation as the reverse of my interpretation."

After receiving treatment at Loretto, plaintiff was taken to the 15th District police station where he was charged with unlawful use of a weapon, battery and resisting arrest. While he was there, plaintiff was interviewed by Gino Divito, an Assistant State's Attorney. Plaintiff gave an oral statement to Divito in which he gave an account of the shooting generally consistent with his testimony in his subsequent state court trials and the testimony he has given here. When Mr. Divito sought to take a written statement from plaintiff, plaintiff declined.

Divito was advised that a gun had allegedly been found in the squadrol at Loretto Hospital. But none of the officers involved in the incident told Divito of plaintiff's alleged admission.

Divito prepared a written report of his investigation which was received in evidence without objection. The report states, inter alia:

> "I [Divito] asked him [plaintiff] whether he carried any weapon at all, specifically whether he carried a .22 caliber gun. He denied doing so. In interrogating him at one time, he denied without any prompting on my part, he denied striking the police officer, but said he could have shot him. When I asked him what he meant by that, that he had a gun or what. He denied that he had a gun, he stated that it would be foolish for him to strike a police officer with a gun." Plaintiff's Exhibit 3, p. 3.

The reports of the various officers which were prepared several hours subsequent to the events do include plaintiff's alleged admission of the possession of the gun.

As a result of the State charges made against him, plaintiff was taken from the 15th District station to the Cook County Jail where he remained in custody, because of his inability to post bond, until he was acquitted of all of the charges made against him. Following his arrival at the Cook County Jail, he was treated at the Cermak Memorial Hospital which is an adjunct of the jail. The physical examination report of the hospital which was received in evidence without objection, describes the gun shot wound as follows:

> "There is wound of entrance in the mid-cervical spine about 2 cm. lateral to the midline and there is a wound of exit, with some contusion around the wound of exit in the anterior lateral aspects of the neck, in the middle portion of the sternocleidomastoid muscle. The carotid arteries are palpable. However, the patient has marked enduration and edoema at the region of the exit of the bullet wound." Plaintiff's Exhibit 1, fifth page.

In the history portion of the hospital report, the following appears:

> "This is the case of a 36 year old male patient who was admitted to the hospital with a history of gunshot wound over the left side of his neck, three days prior to admission. The patient states that he was shot from behind and there are two wounds in his neck, one at the back, just lateral to the midline of the left side and the wound of exit of the bullet is in the front of the neck, anterior lateral aspect of the neck." Id. sixth page.

In June, 1972 in preparation for the defense of the criminal charges made against him, plaintiff was examined by Dr. Levine, a forensic pathologist practicing in Chicago. Levine examined the scars on plaintiff's neck. He observed that the bullet had travelled in a lateral straight line. He

testified in this trial that entrance bullet wounds are usually round or oval, while exit wounds are irregular, star-shaped or triangular with splits. When the bullet enters it pushes the skin inward; when it exits, it pushes the skin out and tears the skin. Levine testified that he was able to ascertain which was the entrance wound and which was the exit wound from an examination of the scars. He testified that the scar on the back of the neck was almost round or oval and that the scar on the front of the neck was larger and irregular. During the course of the trial and while Levine was testifying, we examined the scars on plaintiff's neck and observed that they meet the physical description which Levine gave them. Levine then expressed the opinion that the scar on the back of the neck was a typical entrance scar and the scar on the front of the neck was a typical exit scar.

Dr. Shelby Nasatir, a staff radiologist at Loretto Hospital, testified for the defendants. He had not treated plaintiff. On the basis of x-rays of plaintiff's neck, Dr. Nasatir testified that he could not form an opinion regarding the entry/exit wounds but the wound travelled in a lateral direction with a slight angle.

At a preliminary hearing held on March 14, 1972, on the unlawful use of weapon charge, Castellano, Pardell and Sesso testified essentially in accord with the testimony they have given here. Probable cause was found and plaintiff was bound over to the grand jury.

On April 25, 1972, Castellano, Pardell and Melchiori testified before the grand jury essentially in accord with their testimony here. An indictment was returned charging plaintiff with knowingly carrying a concealed weapon on his person.

On August 21, 1972, plaintiff was tried in a bench trial in the Circuit Court of Cook County on the unlawful use of weapon charge. Castellano, Benigno, Granias, Pardell, Jensen, Musial and Maher testified against him essentially as they have here. Plaintiff was found not guilty by Judge Robert J. Downing.

Thereafter, plaintiff was tried in a bench trial by a different judge and found not guilty of the charges of battery and resisting arrest.

We turn now to a resolution of the issues of fact in this case. There are two of them. Under what circumstances and how was plaintiff shot by Castellano in the hallway of 333 North Central Avenue? As plaintiff has testified, from the back as he stood against the wall? Or as Castellano has testified, from the front as plaintiff struck and resisted Castellano?

The second issue concerns the gun. Did Officer Pardell find it in the squadrol as he has testified, or was it planted there as plaintiff alleges? And did plaintiff admit having the gun as Officers Maher, Musial, Sesso and Melchiori have testified? Or did plaintiff deny ownership of the gun as he has testified?

These same issues were presented to two state judges in the criminal charges brought against plaintiff.[3] In those cases the issues were resolved in favor of plaintiff and

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[3] Although the unlawful use of weapon charge did not directly involve the plaintiff's encounter with Castellano, Judge Downing heard testimony concerning it. At the conclusion of the trial in rendering an oral opinion in which he found plaintiff not guilty Judge Downing said "The Court finds it very difficult [in light of all the evidence] to attach much credibility to the testimony of Officer Castellano."

against the prosecution. There the burden was upon the State to prove plaintiff's guilt beyond a reasonable doubt and it failed to do so. Here the burden is upon the plaintiff to persuade us by a preponderance of the evidence that the facts are as he alleges them to be.

Despite the defendants' insistence that plaintiff, "a four time loser" (Br. 6), should not be believed we are persuaded that the shooting incident occurred as plaintiff has testified. All of the objective evidence points to that conclusion.

First is the undisputed fact that the wound travelled laterally through plaintiff's neck at virtually no angle.[4] Dr. Levine so testified and we observed the scars in plaintiff's neck during the trial. An imaginary line drawn between the two scars would be almost horizontal and parallel with the floor upon which Castellano and plaintiff were standing. Yet during his testimony at this trial, Castellano demonstrated what he said was his position in relation to plaintiff and the movement that occurred between himself and plaintiff as the shot was fired. He showed that he had his gun at his waist, extended forward somewhat, and claimed that plaintiff grabbed Castellano's gun hand with plaintiff's left hand, causing the gun to discharge. If this were the fact, the trajectory of the bullet as it passed through plaintiff's neck would have been at an upward angle from the front. But it was not, and there was no evidence that the bullet struck something in plaintiff's neck, e.g., a bone or cartilage, and deflected down.

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[4] Defendants' witness, Dr. Nasatir, did not contradict this finding although he testified that he observed a slight angle in the lateral direction of the wound.

Then there is the unequivocal expert testimony of Dr. Levine that the scar on the back of plaintiff's neck evidenced the entry wound and the scar on the front the exit wound.

Next, there is the hospital report of Cermak Memorial Hospital. The records of the hospital show that plaintiff was admitted February 3, 1972 (3 days after the shooting) and discharged on February 9. The report of physical examination bears a somewhat illegible date in the upper right hand corner which appears to be "2-3-72." In the lower left hand corner, there are dictation symbols which read "Dr. M. Arain:A-1" and beneath that "D. 2/4/72" and beneath that "T. 2/4/72" which we interpret to mean that the report was dictated on February 4 and transcribed the same day. The report of physical examination states, "There is a wound of entrance in the mid-cervical spine about 2/ cm. lateral to the midline and there is a wound of exit, with some contusion around the wound of exit in the anterior [front] lateral aspect of the neck, . . ."

Next there is the report of Dr. Smith at Loretto Hospital emergency room which when originally written characterized the entry wound as the left posterior and the exit wound as the left anterior. Smith did not testify, but his letter explains that he changed the words "exit" and "entry" because of his notation in "physical findings" "Neck: powder (?) burns antr △ (anterior triangle) L neck." We are unimpressed with the explanation.

Defendants rely heavily on the alleged powder burns in the anterior (front) of plaintiff's neck. Officer Benigno testified that he saw powder burns on plaintiff's neck at Loretto Hospital when he was taking plaintiff to x-ray and plaintiff's dressing fortuitously fell off.

To corroborate Benigno, defendants called Ernest Warner, a firearms examiner for the Chicago Police Department. He testified that in September, 1974, twenty-one months after the incident in question, he conducted some tests with a .357 revolver and some homemade ammunition submitted to him by Castellano. He ran powder pattern tests from 3 inches to 24 inches in increments of 3 inches from white paper targets using factory ammunition and homemade ammunition. We saw the patterns and there were marked differences between those created by the factory ammunition and the homemade ammunition with the homemade creating the larger pattern. However, neither created a significant pattern at 24 inches which, according to Castellano's testimony and his demonstration, would have been the least distance between the discharged weapon and the front of plaintiff's neck. Furthermore, there was no testimony that the revolver which Warner tested was the revolver Castellano used on the night in question, and if it was, whether it was in the same condition when tested as when fired, and there was no testimony regarding the type of ammunition which Castellano used, i.e., homemade or factory. Consequently, the tests were of no probative value.

On the basis of the trajectory of the bullet, Dr. Levine's testimony and the results of the physical examination at Cermak Memorial Hospital, we credit plaintiff's testimony that he was shot in the back of the neck as he stood facing the wall in the hallway at 333 North Central Avenue.

In the circumstances which confronted Castellano that night, he was justified in having his weapon ready for use. His command to plaintiff to halt and get up against the wall so that he could pat plaintiff down was reasonable. *Terry* v. *Ohio,* 392 U.S. 1 (1968). But there was no occasion for him to discharge his weapon. And under no circumstances was he justified in falsely accusing plaintiff of resisting arrest and battery and testifying falsely at the preliminary hearing, grand jury, two criminal trials and the trial here that he had shot plaintiff from the front when plaintiff grabbed for Castellano's gun.

The gun incident has its beginning point immediately after plaintiff was shot. Plaintiff, who we have found to be credible with respect to the shooting incident, testified that when he fell to the floor, Castellano went through his pockets. Benigno and Granias came to the second floor corridor following the gun shot and took plantiff down the stairs to the squadrol. On the way down, Granias attempted to pat down plaintiff. When plaintiff arrived at the squadrol, Pardell ran his hands down from under plaintiff's arms to his ankles before placing him on the stretcher in the squadrol. In short, plaintiff was searched before he was placed in the squadrol and no gun was found on his person.

Pardell testified that after plaintiff was taken to the emergency room at Loretto Hospital, he (Pardell) searched the prisoners' section of the squadrol and found a .22 caliber Rohn revolver underneath the stretcher. Pardell claims to have delivered the gun to Maher who in turn displayed it to plaintiff while Officer Sesso asked if it was plaintiff's gun. According to Maher, Musial, Sesso and Melchiori, plaintiff admitted it was his gun.

Plaintiff denies that he admitted the gun was his. He also denies that he ever had the gun. While presumably in the custody of the Chicago Police Department, the gun was not produced at this trial nor was any explanation offered for defendants' failure to do so.

Plaintiff testified in this trial that during the concealed weapon trial when the gun was available, he demonstrated that the gun could not have been concealed in the pocket of his pea coat. The transcript of that trial which was received in evidence here without objection corroborates him.

Then there is the remarkable incident regarding the crime lab person who was dusting the bullets in the gun for fingerprints at the 15th District station. According to Maher, the crime lab person dropped the gun and bullets, but picked up the bullets without taking any precautionary measures to preserve the integrity of any fingerprints which might have been on them.

Finally, there is Assistant State's Attorney Divito's testimony that when he conducted his investigation and interrogation in the early morning hours of January 31 at the 15th District station, no one advised him that Spears had admitted owning the gun.

The credible testimony and circumstances leave us with an abiding conviction that the gun was not found in the squadrol and Pardell's testimony that it was is false. Plaintiff did not admit ownership of the gun and the testimony of Maher, Musial, Sesso and Melchiori that he did is false. In short, Pardell, Maher, Musial, Sesso and Melchiori falsely accused plaintiff of possession of a concealed gun.

There is no question that the conduct of which plaintiff complains was performed by all of the defendants under color of state law. 42 U.S.C. § 1983; *Monroe* v. *Pape*, 367 U.S. 167 (1961). Nor can there be any question that their conduct was actionable under § 1983. Castellano violated plaintiff's Fourth, Eighth and Fourteenth Amendment rights when he intentionally or recklessly shot plaintiff. *Monroe* v. *Pape, supra; Davis et al.* v. *Murphy et al.*,

559 F.2d 1098 (7th Cir. 1977); *Clark* v. *Ziedonis*, 368 F. Supp. 544 (E.D. Wisc. 1973). Castellano also violated plaintiff's Fourteenth Amendment rights when he falsely accused plaintiff of battery and resisting arrest and testified falsely against plaintiff in respect to those charges in the several state court proceedings. *Davis et al.* v. *Murphy et al., supra.* So, too, did Pardell, Maher, Musial, Sesso and Melchiori violate plaintiff's Fourteenth Amendment rights by their false accusations and testimony regarding the concealed gun. *Davis et al.* v. *Murphy et al., supra.* All of the defendants acted wilfully and maliciously. *Bonner* v. *Coughlin*, 545 F.2d 565 (7th Cir. 1976). Accordingly, plaintiff is entitled to recover damages from all of the defendants who remain in the case.

As a consequence of Castellano's unlawful use of excessive force, plaintiff suffered a grievous wound and its attendant pain and suffering which, he testified, persisted for almost a year.[5] But Pardell, Maher, Musial, Sesso and Melchiori are not accountable for that injury.

As a consequence of the false charges and testimony made and given against him by all of the remaining defendants, plaintiff was incarcerated for more than eight months awaiting trial; he was unable to post bond. As a result of his confinement, he lost his job at Sears. He also incurred the expenses of attorney's fees.

The false accusations and testimony of Castellano was done by him individually; the false accusations and testimony of Pardell, Maher, Musial, Sesso and Melchiori were done by them jointly.

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[5] Fortunately plaintiff suffered no permanent injury other than the entry/exit scars.

Plaintiff's complaint prays damages in the amount of $1,000,000. In his closing argument and post trial brief plaintiff did not request damages in any particular amount leaving any award to our discretion. Because we see all of Castellano's conduct to be separate and distinct from that of Pardell, Maher, Musial, Sesso and Melchiori we have concluded that separate, cumulative judgments are appropriate. After careful consideration of all of the evidence we award plaintiff $100,000 in damages from defendant Edward Castellano plus $100,000 in damages from defendants Kenneth Pardell, Frank Musial, Frank Maher, James Sesso and Donald Melchiori jointly and severally. Plaintiff will have judgment in those amounts together with his costs.

Enter:

/s/ Prentice H. Marshall
Judge Prentice H. Marshall

Dated: November 3, 1977

Supreme Court, U. S.
FILED
AUG 21 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-94

EDWARD CASTELLANO, KENNETH PARDELL,
FRANK MUSIAL, FRANK MAHER,
JAMES SESSO and DONALD MERCHIORI,

Petitioners,

vs.

WILLIE SPEARS,

Respondent.

PETITION TO PROCEED IN FORMA PAUPERIS

Comes now the Respondent in the above-entitled cause, WILLIE SPEARS, by and through his attorney, RICK HALPRIN, and petitions this Court for leave to proceed in this matter in forma pauperis pursuant to 28 U.S.C. Section 1915, in support whereof Respondent states as follows:

1. That Respondent in this matter was Plaintiff in a civil rights case heard before the United States District Court for the Northern District of Illinois, Eastern Division and appealed by the Petitioners herein to the Seventh Circuit Court of Appeals.

2. That throughout the proceedings in the Court s below, Mr. Spears was indigent.

3. That Mr. Spears remains indigent to the present time and is without sufficient funds to proceed before this Court in the absence of leave to proceed in forma pauperis.

4. That attached hereto and made a part of this Petition is the affidavit of the Respondent, Willie Spears, as to his indigency status and need to proceed before this Court in forma pauperis.

WHEREFORE, Respondent in this cause, WILLIE SPEARS, prays that this Court will grant him leave to proceed in the above-captioned cause in forma pauperis.

Respectfully submitted,

RICK HALPRIN
Attorney for Respondent
134 North LaSalle Street
Chicago, Illinois 60602
341-0233

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-94

EDWARD CASTELLANO, KENNETH PARDELL,
FRANK MUSIAL, FRANK MAHER, JAMES
SESSO and DONALD MELCHIORI,

Petitioners,

vs.

WILLIE SPEARS,

Respondent.

AFFIDAVIT

WILLIE SPEARS, being first duly sworn on oath does hereby depose and state as follows:

1. I am Willie Spears and I am the Respondent in the above-captioned cause.

2. Throughout the time that my civil rights cause against the Petitioners herein was before the United States District Court and the Seventh Circuit Court of Appeals, I was indigent in that I did not have any regular employment or consistent income.

3. I remain indigent to the present time, having no current source of income and no financial assets.

4. In the case that is now before this Court I was the Plaintiff in a civil rights action in which I alleged the violation of various of my civil rights on the part of the Petitioners herein. Upon a bench trial before the United States District for the Northern District of Illinois, Eastern Division, judgment was entered in my favor and against the Petitioners herein. That these Petitioners then appealed the judgment to the Seventh Circuit Court of Appeals which Court affirmed the judgment in my favor and against these Petitioners. These Petitioners have now sought a Writ of Certiorari from this Court and I feel that my interests in this matter can be protected only by responding to their Petition for Writ of Certiorari. Due to my indigent status I am unable to sustain the financial burdens of responding to Petitioners' request for Certiorari. Therefore I am seeking leave of this Court to proceed in this matter in forma pauperis.

And further affaint sayeth not.

WILLIE SPEARS

STATE OF ILLINOIS) SS
COUNTY OF COOK)

WILLIE SPEARS, being duly sworn on oath, does state that he has read the above and proceeding affidavit by him subscribed and that it is true in substance and in fact.

WILLIE SPEARS

Subscribed and Sworn to
before me this ___ day
_____, 1979.

NOTARY PUBLIC

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-94

EDWARD CASTELLANO, KENNETH PARDELL,
FRANK MUSIAL, FRANK MAHER,
JAMES SESSO and DONALD MELCHIORI,

Petitioners,

vs.

WILLIE SPEARS,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RICK HALPRIN
134 North LaSalle Street
Chicago, Illinois 60602
341-0233
Attorney for Respondent

STATEMENT OF THE CASE

For purposes of this proceeding Respondent adopts the statement of the case presented by Petitioners at Pages 4-7 of their brief.

REASONS FOR DENYING THE WRIT

I.

THE FINDING OF THE DISTRICT COURT WAS CLEARLY NOT ERRONEOUS AS A MATTER OF LAW AND THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THAT FINDING.

The finding of the District Court was not erroneous as a matter of law and the Court of Appeals did not err in declining to reverse that finding. At pages 8-12 of their brief, Petitioners herein set forth those portions of evidence adduced at the trial of this case which they believe stand in contradistinction to the finding of the trial court in favor of Respondent.

These same arguments, based upon these same portions of evidence adduced at trial, were argued by Petitioners' counsel at trial, upon a Motion for New Trial, and before the Seventh Circuit Court of Appeals.

Petitioners are in error in their statement that the unpublished noncitable opinion of the Seventh Circuit reducing this case to no more than a determination of the credibility of witnesses is erroneous. That is to say that the Seventh Circuit Court of Appeals did not erroneously reduce the issue to determination of the credibility of witnesses. That was the issue and it was framed as such by the argument presented by Petitioners to that Court, which argument is virtually identical to the one now being made before this Court.

In a twenty-two page memorandum opinion entered by the trial court after long deliberation of the evidence, findings were made that the Plaintiff's testimony was believable and that the testimony of the police officers involved was not believable. That was the issue at trial and remained the issue on appeal. The trial court acting as a trier of fact made its findings with regard to the credibility of the witnesses who appeared and testified before it and the Seventh Circuit was correct in stating that the record of evidence adduced at trial and the memorandum opinion of the trial court acting as the trier of fact did not admit of the possibility that as a matter of law the District Court's findings were clearly erroneous.

The issue being one of fact and credibility of witnesses, and the trial court having had the opportunity to observe the

demeanor of all of the witnesses who testified before it and having made its findings of fact as to the credibility of those various witnesses, and the Appellate Court having ruled that that was the circumstance, Respondent suggests that neither finding was erroneous, as a matter of law, and that the same argument having been made at trial, during post trial motions and upon appeal does not provide appropriate grounds for Writ of Certiorari before this Court.

II.

THE TRIAL JUDGE DID NOT DEPRIVE PETITIONER CASTELLANO OF DUE PROCESS OF LAW.

The trial judge did not deprive Petitioner Castellano of due process of law and did not rely on the opinion of another judge in another case as to the veracity of said Petitioner in reaching his own findings as to the veracity of that Petitioner.

This argument by Petitioner Castellano was not raised to trial nor upon appeal and is therefore not properly raised before this Court at this time.

At no time during the course of the trial, now upon a Motion for a New Trial, nor upon appeal before the Seventh Circuit Court of Appeals, did any Petitioner argue against the footnote remark of the trial court contained in 22 page memorandum opinion noting that at the conclusion of a criminal trial in rendering an oral opinion in which Plaintiff was found not guilty, Judge Downing said, "The Court finds it very difficult (in light of all of the evidence) to attach much credibility to the testimony of Officer Castellano". It should be noted by this Court that the entire record of the criminal trial of Willie Spears upon the charges lodged against him by these Petitioners was admitted into evidence in the civil rights trial before the District Court by stipulation of the parties.

Moreover, this argument now stated at Pages 12-14 of Petitioners' brief was not raised before the trial or appellate courts at any time. For this reason we ask respectfully of this Court that if not consider this argument upon a petition.

In the event that this Court does consider this argument raised in behalf of Petitioner Castellano, Respondent would again call to this Court's attention the fact that the record of the criminal trial, including the remarks of Judge Downing made at the conclusion of that trial, was admitted into evidence in the trial before the District Court by stipulation or the parties. Petitioners were then aware that said record contained the remarks of Judge Downing as a part of his findings of fact with regard to the credibility of Petitioner Castellano. Having stipulated to the admission of such evidence at trial, Petitioners had ample opportunity to present evidence of Petitioner Castellano's reputation among his associates of in the community for veracity. Petitioners having declined to do so at trial are, Respondent respectfully suggests, precluded from now complaining to this Court that the evidence the admission of which was stipulated to by them, and unrefuted by them, constitutes grounds for the granting for a Writ of Certiorari upon a claim of denial of due process. There could be no denial of due process when the Petitioner stipulated to the admission of this evidence at trial and took no step to refute it having stipulated to its admission.

III.

THERE WAS NO ERRONEOUS RELIANCE ON THE PART OF THE TRIAL COURT ON THE HEARSAY OPINION JUDGE AND NO HEARSAY OPINION DETERMINED THE AWARD ENTERED AGAINST ANY PETITIONERS.

Petitioners, at page 15 of their Brief, cite a single paragraph of the trial court's lengthy Memorandum Opinion which succinctly states the court's "abiding conviction", based on that evidence presented which the court found to be credible, that Respondent's civil rights had been violated.

There is not the slightest hint anywhere within that opinion that the conclusion of the trial court of the amount of jdugment it awarded was based on anything but that evidence properly adduced before it. The opinion (reproduced in Petitioners' Brief Appendix, pages 4a-22a) recites all of the evidence heard by the Court. It sets forth the testimony of the Petitioners and compares and contrasts it with that of Respondent and various expert witnesses. It notes that the Respondent's treating physician authored a letter which was received into evidence without objection stating his recollection of changing his report concerning the location of Respondent's exit and entry wounds.

It notes that the jail hospital records, made the night of the shooting, reflect wounds consistent with those first described by the treating physician and with Respondent's testimony that he was shot in the back of the neck. It notes further corroboration of that testimony in the testimony of Dr. Victor Levine, a forensic patholigist. It notes that Petitioner's witness, a staff radiulogist at the hospital where Respondent was treated, was incapable of forming an opinion at to exit and entry wounds. but declined to oppose those of the other expert witnesses and medical reports.

In stating its findings concerning credibility the trial court rejected Petitioner's argument that Respondent, "a four time loser", should not be believed. It stated clearly that "all of the objective evidence points to that conclusion" that he was credible and Petitioners were not.

That objective evidence included consideration of Petitioner Castellano's testimony that he shot Respondent in a face to face confrontation which the Court found totally unbelievable when examined in light of Dr. Levine's testimony (page 17a) the records of Cermack Memorial Hospital (page 17a), Dr. Smith's report (page 17a) and the testimony of Petitioners' own expert firearms witnesses (page 18a).

The court noted that Petitioners testified to Respondent's admission of possession of a gun and their presumed custody of it since the indicent (page 19a), and their failure to produce the gun at trial.

The court's findings stated the total lack of credibility of Petitioners' testimony that all fingerprint evidence on the alleged gun and bullets were destroyed through clumsiness and carelessness at the Chicago Police Department Crime Laboratory (page 20a).

It also found the testimony of the assistant State's Attorney who interrogated Respondent after the shooting that noone told him of an admission to possession of a gun corroborative of Respondent's testimony and cumulative as to the incredibility of Petitioners' testimony. (page 20a)

Having set forth all of these factual findings the trial court stated its abiding conviction as to the credibility of the testimony and evidence that Respondent did not have a gun and did not make an admission to that effect, and that Petitioners' testimony in that regard was all false. (page 20a).

Wholly disregarding these lengthy and detailed findings and the judgment made upon them by the Seventh Circuit Court of Appeals, Petitioners now invite this Court to join them in conjecture that what really persuaded the trial court was not the evidence it heard and observed but rather a reliance upon someone else's opinion of the events surroinding the shooting and prosecution of Mr. Spears. Is is upon this invitation to conjecture that Petitioners seek from this Court a Writ of Certiorari. Petitioners have asked the Court to re-examine the evidence taken and join them in the conclusion that the trial court shouldn't have found Respondent credible and shouldn't have found Petitioners incredible (page 15). At the same time they attempt to persuade the Court that there is more here than issues of fact and credibility in opposing the opinion of the Seventh Circuit Court of Appeals that the case presented no more, upon review, than a determination of credibility. (page 12).

Respondent respectfully suggests that the trial court accurately framed the issue as one of credibility, that the Seventh Circuit accurately described it in the same context and that it remains the same before this Court thereby rendering it inappropriate to review by a grant of certiorari. This is particularly true with regard to Petitioners' argument that the trial court's conjectured reliance upon the opinion of another judge in another proceeding that Petitioner Castellano had testified falsely in any way contributed to the amount of the judgment awarded. To support this bizarre argument, raised for the first time before this Court, Petitioners note (page 15) only that in order to reach the conclusion it did the trial court must have believed Respondent and disbelieved the Petitioners and to do so it must have relied on Judge Downing's opinion. In refutation of that theory stands the entire memorandum opinion of the trial

court that based upon what it saw and heard at trial it concluded Petitioners testified falsely and Respondent testified truthfully.

IV.

THE TWO JUDGMENTS AWARDED ARE NOT EGREGIOUSLY EXCESSIVE AND SHOULD NOT BE SET ASIDE.

The arguments raised by Petitioners concerning the amount of judgment awarded are identical to those raised at trial and in the appeal proceedings. The Seventh Circuit affirmed the awards made.

The amount of judgment is in the discretion of the trier of fact. The cases cited by Petitioners (page 17) are factually distrint from this one.

The trial court heard the evidence and concluded that as a result of all the Petitioners' conduct, occurring over a long period of time and under color of law, Respondent was shot, jailed, falsely accused and falsely testified against in criminal trials which would have resulted in his imprisonment had Petitioners only succeeded in convincing a judge or jury of their false claims.

In essence the trial court found a conspiracy among a group of police officers to falsely charge and prosecute an innocent man after shooting him in the back of the neck and claiming a face to face confrontation. To achieve these ends they lied about the innocent man's possession of a gun, confession of such possession, their own handling of the alleged evidence of such possession and that of the Chicago Police Department Crime Laboratory personnel, and persisted in such lies throughout the innocent man's criminal prosecution and civil rights trial.

Having reached those conclusions it was the task of the trial court, acting as a trier of fact, to translate the enormity of these civil rights violations committed by police officers against an innocent citizen into a monetary judgment. What precisely is the monetary equivalent of wrongfully shooting a citizen and then acting in concert and under color of law, to plant evidence and a confession upon him, falsely charge and prosecute him and falsely testify against him in a series of trials, while keeping him jailed for eight months.

Petitioner respectfully suggests that he cannot make such a computation but that the trial court's computation in this regard cannot be said to be excessive as a matter of law. He also notes that this conclusion on his part is the same as that reached by the Seventh Circuit Court of Appeals.

For these reasons Respondent respectfully suggests that this argument presents no appropriate ground for a grant of certiorari.

IV.

THIS PETITION IS DILATORY IN NATURE AND SANCTIONS SHOULD BE IMPOSED UPON PETITIONERS.

Respondent was shot, jailed and faslely accused in 1972. He spent the next eight months in jail and was then subjected to false prosecution.

It took seven years for his civil rights case to be tried, ruled upon, appealed and affirmed by the Seventh Circuit Court of Appeals. Throughout that time he has been indigent.

It is obvious from even a cursory reading of their Brief that Petitioners have presented no appropriate argument upon which certiorari should be granted by this Court. No matter how they have strained logic and twisted language, Petitioners have failed to present any issue that is not one of fact and credibility, as the Seventh Circuit Court of Appeals accurately noted in its opinion.

It is not Respondent's contention that any party to a lawsuit should be arbitrarily precluded from review of an adverse decision. However, we do note the practice of federal courts, particularly in criminal cases, to deny appeal bonds to appellants whose appeals are clearly pursued for pusposes of delaying enforcement of judgment, e.g. imposition of sentence.

Those conclusions are reached where it is obvious that no real issue can or will be raised on appeal. Respondent respectfully suggests that the Petitioners have embarked upon such an appeal before this Court.

There is no issue of law to be found in their Brief. The issues of fact are not substantial and have been summarily dismissed by the Seventh Circuit Court of Appeals.

It is Respondent's contention that the procedure before this Court was initiated by the City of Chicago, which has undertaken the indemnification of the Petitioners-police officers, for the sole purpose of delaying payments of the judgment awarded against them.

Respondent, who remains indigent and unsophisticated with regard to the procedures of this Court, respectfully requests whatever relief this Court may grant him in response to the actions of Petitioners described above.

In response to these actions Respondent has again had to seek the services of his counsel and request of him that he expend the time and effort to prepare this response without being able to compensate him for that time and effort. Respondent himself has again been compelled to await the relief awarded him by the district court and affirmed by the Seventh Circuit Court of Appeals for that violation sustained by him at the hands of the Petitioners in 1972.

For these reasons Respondent seeks whatever relief may be available to him from this Court in the nature of attorneys fees and penalties against Petitioners.

CONCLUSION

For the foregoing reasons, it is requested that a Writ of Certiorari not issue and that the judgment of the Court of Appeals remain undisturbed.

Respectfully submitted,

RICK HALPRIN
Attorney for Respondent

Judith A. Halprin
of Counsel